UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 20-1846-bk(L); 20-1953-bk(XAP) Caption [use short title]

Motion for: Clarification of order tolling the deadline to sublet pending appeal.

Set forth below precise, complete statement of relief sought:

Clarification that tolling deadline is inapplicable in light of Bankruptcy Court's indicative ruling or, in the alternative, to toll the deadline until after the Supreme Court resolves the issues raised by MOAC.

In Re: Sears Holdings Corporation

MOVING PARTY: Transform Holdco LLC **OPPOSING PARTY:** MOAC Mall Holdings LLC

☐ Plaintiff ☐ Defendant

☐ Appellant/Petitioner ☑ Appellee/Respondent

MOVING ATTORNEY: Richard A. Chesley **OPPOSING ATTORNEY:** David W. Dykhouse

[name of attorney, with firm, address, phone number and e-mail]

DLA Piper LLP (US)
1251 Avenue of the Americas
New York, NY 10020

Patterson Belknap Webb & Tyler LLP
1133 Avenue of the Americas
New York, NY 10036

Court- Judge/ Agency appealed from: McMahon, J., United States District Court for the Southern District of New York.

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1): ☑ Yes ☐ No (explain):

Opposing counsel's position on motion: ☐ Unopposed ☑ Opposed ☐ Don't Know

Does opposing counsel intend to file a response: ☑ Yes ☐ No ☐ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUCTIONS PENDING APPEAL:

Has this request for relief been made below? ☑ Yes ☐ No

Has this relief been previously sought in this court? ☐ Yes ☑ No

Requested return date and explanation of emergency: Return date requested by February 15, 2022. Emergency relief is warranted because this Court's prior tolling order set a deadline of February 15, 2022, and it is unclear whether this deadline continues to apply following the Bankruptcy Court's indicative ruling.

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☑ Yes ☐ No If yes, enter date: April 30, 2021

Signature of Moving Attorney:

/s/ Richard A. Chesley **Date:** 4 Feb 2022 Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

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No. 20-1846(L); 20-1953(XAP)

United States Court of Appeals for the Second Circuit

IN RE: SEARS HOLDINGS CORPORATION,

Debtor

MOAC MALL HOLDINGS LLC,

Appellant-Cross-Appellee,

v.

TRANSFORM HOLDCO LLC,

Appellee-Cross-Appellant.

On Appeal from the United States District Court for the Southern District of New York

TRANSFORM'S EMERGENCY MOTION TO CLARIFY CERTAIN ISSUES PENDING MOAC'S PETITION FOR WRIT OF CERTIORARI

Date by which relief is requested:
No later than February 15, 2022

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Appellee-Cross-Appellant Transform Holdco LLC ("Transform") respectfully submits this motion ("Clarification Motion") for an order clarifying this Court's August 17, 2021 tolling order ("Tolling Order") based on an indicative ruling from the bankruptcy court. In support of this Clarification Motion, Transform submits the declaration of D. Scott Carr ("Carr Declaration").

This Clarification Motion relates to a valuable lease ("Lease") at the Mall of America. Transform purchased the Lease from the Sears bankruptcy estate, and MOAC Mall Holdings LLC ("MOAC") is the landlord to Transform under the Lease. When the bankruptcy court approved the sale and assignment of the Lease to Transform, it entered an order ("Assignment Order") that required Transform to sublease a portion of the space within two years after the entry of the Assignment Order and, in accordance with the Lease, required Transform to offer a right of first refusal to MOAC in the event of any transfer of the Lease. SPA-82. The Assignment Order also prohibited MOAC from "improperly interfering" with Transform's efforts. *Id*. Due to Transform's concerns that the two-year period would lapse

during the appellate process, this Court tolled that deadline until sixty days after its order on the pending appeal, or until February 15, 2022, following issuance of the Court's December 17, 2021 Summary Order.

Transform has entered into a sublease ("Sublease") with a subtenant ("Subtenant")[1] for a portion of the premises within the time frame established by the Assignment Order as extended by this Court. MOAC has objected to the Subtenant and the Sublease. Thus, Transform filed a motion to enforce the Assignment Order's non-interference provision with the bankruptcy court ("Bankruptcy Enforcement Motion") to enable the bankruptcy court to determine whether Transform had satisfied the sublease provisions of the Assignment Order. MOAC objected to the Bankruptcy Enforcement Motion.

The bankruptcy court held oral argument on January 20, 2022, on the Bankruptcy Enforcement Motion. Relevant to this Clarification Motion, the bankruptcy court—interpreting its own order—held that the two-year

[1] The Sublease (including the identity of the Subtenant) is confidential but has been provided in unredacted form to MOAC.

period "did not apply" to the circumstances here. But, given the pendency of matters before this Court, the bankruptcy court did not enter an order and instead issued an indicative ruling[2] that the two-year period was

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[2] Rule 8008 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") contains similar concepts to those in Rule 12.1 of the Federal Rules of Appellate Procedure (the "Appellate Rules") and provides:

> (a) **Relief Pending Appeal**. If a party files a timely motion in the bankruptcy court for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the bankruptcy court may:
>
> (1) defer considering the motion;
>
> (2) deny the motion; or
>
> (3) state that the court would grant the motion if the court where the appeal is pending remands for that purpose, or state that the motion raises a substantial issue.
>
> (b) **Notice to the Court where the appeal is pending.** The movant must promptly notify the clerk of the court where the appeal is pending if the bankruptcy court states that it would grant the motion or that the motion raises a substantial issue.
>
> (c) **Remand after an indicative Ruling**. If the bankruptcy court states that it would grant the motion or that the motion raises a substantial issue, the district court or BAP may remand for further proceedings, but it retains jurisdiction unless it expressly dismisses the appeal. If the district court or BAP remands but retains jurisdiction, the parties must promptly notify the clerk of that court when the bankruptcy court has decided the motion on remand.

inapplicable here. Several days later, this Court entered its order staying the issuance of the mandate pending disposition on MOAC's expected petition for writ of certiorari.

Now that this Court has granted a stay of the mandate, Transform brings this motion to clarify that, notwithstanding this Court's Tolling Order extending the two-year time frame in the Assignment Order to February 15, 2022, the two-year period has not started and will not lapse, based on the bankruptcy court's indicative ruling. Alternatively, if this Court disagrees with the bankruptcy court's interpretation of its Assignment Order in its indicative ruling, Transform respectfully requests that the Court further toll the February 15, 2022 deadline.

BACKGROUND

I. Lower Court Proceedings

As part of its bankruptcy proceedings, Sears sold most of its assets to Transform including the Lease for a three-story anchor location with nearly 70 years remaining at the Mall of America in Minneapolis, Minnesota. *See* SPA-4.

The bankruptcy court entered the Assignment Order authorizing the sale of the Lease to Transform, over MOAC's objection, on September 5, 2019. *See* SPA-65. In response to MOAC's objection to the assignment, however, the bankruptcy court required Transform to sublet a portion of the premises within two years of the sale, "on the condition that [MOAC] does not improperly interfere with [Transform's] attempt to sublet the premises." *See* SPA-82.

MOAC appealed the Assignment Order to the district court. The district court originally vacated the bankruptcy court's order and remanded in a February 27, 2020 decision. SPA-86. Transform then petitioned the district court for rehearing because the court lacked jurisdiction over the appeal from the sale order under 11 U.S.C. § 363(m). The district court granted rehearing, vacated its February 27, 2020 decision, and dismissed MOAC's appeal for lack of appellate jurisdiction. MOAC then appealed to this Court without seeking a stay of the district court's rehearing decision; Transform conditionally cross-appealed the district court's original ruling.

II. This Court Affirms the District Court's Decision

On March 9, 2021, after the appeal was fully briefed, Transform filed a motion to expedite the appeal, citing the then-upcoming two-year September 5, 2021 deadline to sublet as grounds for expediting the hearing and decision. On March 16, 2021, this Court granted the motion to expedite, scheduling oral argument for April 30, 2021.

On August 12, 2021, Transform filed a motion to toll the deadline to sublet in the bankruptcy order. On August 17, 2021, this Court granted the tolling motion, tolling the deadline to sublet until sixty days after this Court "enters its decision regarding the appeal."

On December 17, 2021, this Court issued a summary order affirming the district court's ruling, effectively tolling the deadline in the Assignment Order to sublet any portion of the Lease to February 15, 2022.

III. MOAC's Interference and the Bankruptcy Enforcement Motion

The Lease has substantial value because, among other things, it has a term that runs until 2091 and has a rent of just $10 per year. *See* SPA-88-89. Since the bankruptcy court approved Transform's purchase of the Lease,

Transform searched for a subtenant to take some or all of the space in order to comply with the Assignment Order and to realize some value from the Lease. In a difficult environment for brick-and-mortar retailers, this was a challenging process, all the more with the onset of the COVID-19 pandemic in 2020. *See* Carr Decl. ¶ 3.

After 18 months of searching, Transform identified a major retailer interested in subleasing part of the space available under the Lease. *See* Carr Decl. ¶ 4. But the Subtenant wants certainty that it will be able to remain in the leased premises. *See* Carr Decl. ¶ 5.

After many months of negotiations, Transform signed the Sublease with the Subtenant. The Sublease recognizes the pendency of the dispute with MOAC and, accordingly, includes a clause that conditions the effectiveness of the Sublease upon a "Litigation Resolution," meaning a determination that: (i) the Assignment Order is fully valid and enforceable, (ii) the Sublease is a valid and enforceable sublease under the Lease, (iii) the Sublease constitutes a sublet as contemplated under the Assignment Order, and "(iv) the ROFR Resolution Date . . . has occurred in connection with th[e]

Lease." *See* Carr Decl. ¶ 6. The Sublease has a provision that if the Litigation Resolution or the ROFR Resolution have not occurred within 270 days after the day the Sublease was executed on November 2, 2021, then either Transform or the Subtenant can terminate the Sublease, unless they agree otherwise ("Sublease Termination Provision"). *See* Carr Decl. ¶ 6. The bankruptcy court noted that Transform is facing a "separate deal clock" due to the Sublease Termination Provision. Ex. 1, 71:10-15.

On November 4, 2021, Transform sent a notice to MOAC of the right of first refusal as required by the Assignment Order and the Lease ("ROFR Notice"). *See* Carr Decl. ¶ 7. In the ROFR Notice, Transform provided the executed Sublease, and "first offer[ed] to MOAC the right to sublease the space from Transform at the same price, terms, and conditions." *See* Carr Decl. ¶ 7. In accordance with section 6.3 of the Lease, Transform requested that MOAC accept or reject the offer within 45 days.

On December 17, 2021, shortly after this Court issued its Summary Order, MOAC rejected the right of first refusal. *See* Carr Decl. ¶ 8. MOAC

also purported to "object" to the Subtenant and the Sublease and claimed it "does not consent to the sublease." *See* Carr Decl. ¶ 8.

On January 5, 2022, in response to MOAC's rejection of the ROFR Notice and after the deadline for MOAC to move for rehearing of this Court's Summary Order, Transform filed a motion to enforce the Assignment Order in the bankruptcy court. Transform asked the bankruptcy court to (i) rule that the litigation contingency requirements had been met since there was no stay of this Court's Summary Order, permitting the Sublease to proceed to closing absent such a stay and (ii) prohibit MOAC from further improper interference with Transform's Sublease. Transform also sought a ruling that it has satisfied the requirements of the Assignment Order and the Lease with respect to MOAC's right of first refusal and the Sublease and Subtenant.

One day after Transform filed the Bankruptcy Enforcement Motion, MOAC filed its motion to stay issuance of the mandate in this Court. While the motion to stay was pending, on January 20, 2022, the bankruptcy court

heard arguments on the Bankruptcy Enforcement Motion.[3] In response to Transform's request for the bankruptcy court to conclude that the Assignment Order is "fully valid and enforceable," the bankruptcy court "defer[red] consideration" of that question, Ex. 1, 67:12, because whether "all of the litigation is done," is "something before the Circuit." Ex. 1, 63:23–24.

Transform also raised the anticipated expiration of the two-year period in the Assignment Order, as extended in the Tolling Order. The bankruptcy court concluded that the concern over the expiration of the time period in the Assignment Order was "misplaced" and a "separate issue" from whether the litigation had been resolved, Ex. 1, 64:3–7, concluding that it had jurisdiction over the right of first refusal issue and the appropriateness of the Sublease and the Subtenant and that "the two-year limitation under [the Assignment Order] doesn't apply in these circumstances." Ex. 1, 66:5–6. The bankruptcy judge authorized and directed Transform to inform this Court

[3] Transform seeks to have this Clarification Motion considered the necessary notice of the indicative ruling under Appellate Rule 12.1 and Bankruptcy Rule 8008 and provides the relevant portion of the transcript of the bankruptcy court as **Exhibit 1** ("Ex. 1").

of these views as indicative of how the bankruptcy court would rule if it had jurisdiction to do so. Ex. 1, 66:4–6.

ARGUMENT

I. This Court should adopt the bankruptcy court's indicative ruling or remand the question back to the bankruptcy court for entry of an order.

As part of its Bankruptcy Enforcement Motion, Transform raised concerns over the anticipated, imminent expiration of the two-year period in the Assignment Order, as extended by the Tolling Order to February 15, 2022. MOAC argued in response that the two-year deadline is still in effect. The bankruptcy court heard arguments in relation to the deadline, and then authorized and directed Transform to submit an indicative ruling to this Court reflecting the bankruptcy court's interpretation of that provision of its Assignment Order. *See* Ex. 1, 52:20-24, 58:17-59:14, 66:4-13, 19-22; 67:8-10.

The bankruptcy court stated that "the two-year limitation . . . doesn't apply in these circumstances." Ex. 1, 66:5–6. Specifically, the bankruptcy judge explained that he never intended for the two-year period to apply while the case was on appeal. *See* Ex.1, 59:8-16; 66:3-13. He emphasized that

"Transform shouldn't be up against . . . an imminent deadline . . . because of the pending appeals," Ex. 1, 60:22-25, and clarified that the purpose of including a two-year limitation was to provide a reasonable time for Transform to find a subtenant and implement a sublease. Ex. 1, 60:13-19. The bankruptcy court further stated that "it is important for [the Second Circuit] to know" the bankruptcy court's view on this limitation. Ex.1, 71:2-9; *see also* Ex. 1, 59:8-16; 70:4-5. In essence, the bankruptcy court was of the view that Transform was not yet subject to the two-year sublease deadline and that—although it understood Transform had been cautious in seeking the Tolling Order from this Court—it was not necessary under the circumstances.

To resolve the resulting ambiguity, this Court can either order that the Tolling Order has no further force or effect, as no further extension was or is needed, or the Court can issue an order remanding the two-year question under the Assignment Order to the bankruptcy court to permit it to formalize its indicative ruling under Appellate Rule 12.1 and the similar Bankruptcy Rule 8008: that the two-year deadline to sublet is no longer

applicable. The bankruptcy court has set a hearing on the sublease aspects of the Bankruptcy Enforcement Motion for March 25, 2022; thus, if the Court remands to permit the bankruptcy court to implement its indicative order, any remand order should further toll the deadline in the Tolling Order through the date on which the bankruptcy court rules on the issue on remand.

II. Should the Court disagree with the bankruptcy court's indicative ruling, a further extension of the sublease deadline is warranted.

If the Court disagrees with the bankruptcy court's interpretation of the Assignment Order it entered, or declines to either adopt the bankruptcy court's indicative ruling or remand for implementation of that ruling, Transform respectfully requests that the deadline to sublet be tolled until (a) sixty days after the later of the issuance of the mandate from this Court if MOAC's expected petition for writ of certiorari is denied prior to July 30, 2022 (thereby aligning with the Sublease Termination Provision)[4] and (b) if

[4] Under Appellate Rule 41(d)(4), this Court "must issue the mandate immediately on receiving a copy of a Supreme Court order denying the petition, unless extraordinary circumstances exist."

the writ of certiorari is denied after that date or is granted, the matter is remanded back to the bankruptcy court and the bankruptcy court implements the indicative ruling.[5]

Tolling the deadline in this manner would allow Transform's rights under the Assignment Order to remain unchanged and unharmed. Once the mandate is issued, if Transform prevails before July 30, 2022, it will need time to finalize issues with its Subtenant and MOAC. If that does not happen before July 30, 2022, and the Subtenant terminates the Sublease, Transform will need time to find a new subtenant and negotiate a new sublease.

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[5] As stated in Transform's prior motion seeking the Tolling Order, which is incorporated by this reference, the All Writs Act empowers federal courts "to issue such commands as may be necessary or appropriate to effectuate and prevent frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 413 (2d Cir. 2002); *United States v. New York Tel. Co.*, 434 U.S. 159, 172 (1977). Additionally, "[f]ederal courts possess certain inherent powers, not conferred by rule or statute, to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1186 (2017) (internal quotation marks omitted); *Nederlandse Erts-Tankersmaatschappij, N.V. v. Isbrandtsen Co.*, 339 F.2d 440, 441 (2d Cir. 1964) (courts have "inherent power to grant [a] requested stay" of arbitration). Just as before, these doctrines justify this request.

The requested extension is consistent with the interests of justice and will allow Transform the necessary time it needs to close on the Sublease or seek further relief from the bankruptcy court to provide it time to find another qualified subtenant to ensure it does not lose the value of the Lease it purchased, as applicable.

CONCLUSION

Transform respectfully requests that this Court enter an order clarifying that (i) the two-year deadline for Transform to sublet under the Tolling Order is inapplicable or remanding the matter to the bankruptcy court to permit it to order its indicative ruling or (ii) if the Court determines the two-year deadline remains applicable, then further tolling it until sixty days after the denial of a writ of certiorari, or if certiorari is granted, until sixty days after the matter is fully remanded to the bankruptcy court.

Date: February 4, 2022

/s/ Richard Chesley

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Attorney for Appellee-Cross-Appellant Transform Holdco LLC

Exhibit 1

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 18-23538-rdd

- x

In the Matter of:

SEARS HOLDING CORPORATION ET AL.,

Debtors.

- x

United States Bankruptcy Court

300 Quarropas Street, Room 248

White Plains, NY 10601

January 20, 2022

2:10 PM

B E F O R E :

HON ROBERT D. DRAIN

U.S. BANKRUPTCY JUDGE

ECRO: ART

HEARING re Status Update on Debtors; Progress Towards Effective Date.

HEARING re Notice of Hearing on Interim Applications for Allowance of Compensation and Reimbursement of Expenses on January 20, 2022 at 2:00 p.m. (ECF #10171)

HEARING re Monthly Fee Statement Ninth Interim Fee Application of Prime Clerk LLC, as Administrative Agent to the Debtors, for Services Rendered and Reimbursement of Expenses for the Period from July 1, 2021 through October 31, 2021 filed by Prime Clerk, LLC. (ECF #10162)

HEARING re Application for Interim Professional Compensation /Sixth Interim Fee Application of Henick, Feinstein LLP as Special Conflicts Counsel to the Official Committee of Unsecured Creditors for Allowance of Compensation for Services Rendered and Reimbursement of Expenses for the Period of July 1, 2021 through October 31, 2021 for Herrick, Feinstein LLP, Special Counsel, period: 7/1/2021 to 10/31/2021, fee:$76,275.00, expenses: $30,428.89. filed by Herrick, Feinstein LLP. (ECF #10156)

HEARING re Application for Interim Professional Compensation Eighth Joint Application of Paul E. Harner, as Fee Examiner and Ballard Spahr LLP, as Counsel to the Fee Examiner, for Interim Allowance of Compensation for Professional Services Rendered and Reimbursement of Actual and Necessary Expenses Incurred from July 1, 2021 through October 31, 2021 for Fee Examiner, Other Professional, period: 7/1/2021 to 10/31/2021, fee:$276793.00, expenses: $0.00. filed by Fee Examiner. (ECF #10161)

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HEARING re Application for Interim Professional Compensation/Ninth Application of Weil, Gotshal & Manges LLP, as Attorneys for the Debtors, for Interim Allowance of Compensation for Professional Services Rendered and Reimbursement of Actual and Necessary Expenses IncmTed from July 1, 2021 through and including October 31, 2021 for Weil, Gotshal & Manges LLP, Debtor's Attorney, period: 7 /112021 to 10131/2021, fee:$2,517,997.00, expenses: $148,882.59. filed by Weil, Gotshal & Manges LLP. (ECF #10160)

HEARING re Objection to Motion FOR COMPENSATION BY (1) AKIN GUMP HAUER & FIELD LLP [Doc. 10154]; (2) FTI CONSULTING INC. [Doc. 10155]; AND (3) WEIL, GOTSHAL & MANGES LLP [Doc. 10160] (related document(s)10160, 10154, 10155) filed by Alexander Tiktin on behalf of Orient Craft Ltd. (ECF # 10191)

HEARING re Application for Interim Professional Compensation // Ninth Interim Fee Application of Akin Gump Strauss Hauer & Feld LLP as Counsel to the Official Committee of Unsecured Creditors for Allowance of Compensation for Services Rendered and Reimbursement of Expenses for the Period of July 1, 2021 Through and Including October 31, 2021 for Akin Gump Strauss Hauer & Feld LLP, Creditor Comm. Aty, period: 711/2021 to 1013112021, fee:$839,969.00, expenses: $287,232.21. filed by Akin Gump Strauss Hauer & Feld LLP. (ECF #10154)

HEARING re Objection to Motion FOR COMPENSATION BY (1) AKIN GUMP HAUER & FIELD LLP [Doc. 10154]; (2) FTI CONSULTING INC. [Doc. 10155]; AND (3) WEIL, GOTSHAL & MANGES LLP [Doc. 10160] (related document(s)10160, 10154, 10155) filed by Alexander Tiktin on behalf of Orient Craft Ltd. (ECF # 10191)

HEARING re Application for Interim Professional Compensation // Ninth Interim Application of FTI Consulting, Inc., Financial Advisor to the Official Committee of Unsecured Creditors of Sears Holdings Corporation, et al. for Interim Allowance of Compensation and Reimbursement of Expenses for the Period from July 1, 2021 Through October 31, 2021 for FTI CONSULTING, INC., Other Professional, period: 7/112021 to 1013112021, fee:$266,139.00, expenses: $0.00. filed by FTI CONSULTING, INC. (ECF #10155)

HEARING re Objection to Motion FOR COMPENSATION BY (1) AKIN GUMP HAUER & FIELD LLP [Doc. 10154]; (2) FTI CONSULTING INC. [Doc. 10155]; AND (3) WEIL, GOTSHAL & MANGES LLP [Doc. 10160] (related document(s)10160, 10154, 10155) filed by Alexander Tiktin on behalf of Orient Craft Ltd. (ECF # 10191)

HEARING re Motion for Objection to Claim(s) Number: 20138 and 26385 of the North Carolina Department of Revenue (ECF #9985)

HEARING re Response to Motion (related document(s)9985) filed by Matthew Sommer on behalf of North Carolina Department of Revenue (ECF #10163)

HEARING re Motion to Compel I Motion to Enforce the Order (I) Authorizing Assumption and Assignment of Lease with MOAC Mall Holdings LLC and (II) Granting Related Relief filed by Richard A. Chesley on behalf of Transform Holdco LLC (ECF # 10194)

HEARING re Motion to File Under Seal/ Motion of Transform Holdco LLC for Leave to File Under Seal Portions of Transform Holdco LLC's Motion to Enforce and Accompanying Exhibits filed by Richard A. Chesley on behalf of Transform Holdco LLC. (ECF #10193)

HEARING re Order to Show Cause signed on 12/28/2021 why an answer with attorney representation has not been filed by Defendant, Grace and Son Construction Company of Greenville, Inc. and why Defendant has not retained counsel to represent it in this adversary proceeding (ECF #7)

HEARING re Notice of Agenda of Matters Scheduled for Hearing to be Conducted Through Zoom on January 20, 2022 at 2:00 p.m.

Transcribed by: Sonya Ledanski Hyde

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P R O C E E D I N G S

THE COURT: Okay, good afternoon everyone. This is Judge Drain. We're here in In re Sears Holdings Corporation, et al. The matters on today's agenda are all being heard remotely, primarily by Zoom, unless someone doesn't have access to a screen, in which case they're appearing by telephone.

I'm happy to go down the agenda submitted by the Debtor's counsel, in order, as we've done periodically for some time now, at the start of these omnibus hearings. We'll start with a status report on the Debtor's progress toward achieving the effective date. In that regard, I'll note that I received a status update for today's hearing, dated January 20, for a status update for January 20, which I believe is also on the docket.

I'm not sure who, from the Debtor's counsel will be providing the status report, but you can go ahead at this point.

MR. FAIL: Thank you, Your Honor. Garrett Fail, Weil Gothsal & Manges for the Debtors. Are you able to hear me this afternoon?

THE COURT: Yes, fine, thanks.

MR. FAIL: Good. Good to see you, Your Honor. The presentation we filed on the docket for today is at docket 10240, for those following along. As I've done in

the past, I'll walk the Court through it. And, as in the past, before I start, I will note that the Debtor's coordinated, over the past several weeks and months, on the content of the report, with not only the Pre-Effective Date Committee, but also separately with the advisors for the Administrative Claims Representative, and the UCC, as well as the Administrative Claims Representative.

In advance of this report, the Debtor's thank each of the participants for their time and their analysis and their cooperation.

The punchline of today's report is, it's good news; forward progress. But I'll walk you through the details and explain how I get there.

If we start on page two, Judge, you'll see this is the claim status (indiscernible). And as in the past, we've divided he claims up. The top section deals with those parties that are eligible to receive distributions, because they opted in, or didn't opt out, for payment.

You'll see that the number of … you'll see that basically -- not basically -- you'll see that we fully satisfied 1,068 claims, and that was out of the 1,560. So, about 58 of 8 percent have already been allowed and satisfied in full, out of the administrative claims that opted in.

In addition, you'll see from this report -- and

that's the de minimis lines that have been paid in full, but the majority in number, the vast majority. So, that leaves what you see as the allowed opt-out non-de minimis, and allowed non-opt-out, non-de minimis.

And you'll see, if you compare this report to last time's, that we increased the number of allowed claims by 40. That's by resolving, you know, disputed claims. So, forward progress in revolving claims and moving them to the allowed category.

You'll also note, that it appears from this chart, that there are only 492 claims eligible for distribution; a small fraction of those that we started with. And there's actually, behind the scenes on these numbers, even less than 492 claims.

As a result of preference settlements and other settlements, certain parties that received initial distributions are capped, and only 440 claims are eligible for future distributions. The amounts on the right-hand side of the page do track the total that's remaining to be paid to them, which is $41.3 million to those parties that are allowed. There's only 440 of them.

In the past quarter, we continue to make progress on disputed claims, as I mentioned, including those that were allowed. In the first category, you'll see the number of opt-in claims that were subject to preference increased

by eight; the number of non-opt-out claims that were subject to preference, decreased by 23. Those that needed to be reconciled, decreased by 30.

So, it's only five claims, really, where the substance of the claims remain to be disputed. And you'll see that the distributions that are being held on account of those disputed claims have been reduced dramatically.

And I'll speak more later, Judge, but we think we've gotten, you know, as far as we can with most of these, without going into protracted litigation with promises of appeals, where the benefit of going further, you know, we might be hitting the point of diminishing returns. But to say that we have only five disputed claims out of the thousands that we started with, is the real accomplishment.

In terms of the few parties that opted out, Judge, we've reconciled another 15 of them, which brings the total up to 55. We have resolved 76 that were subject to objection, and we're down to only seven opt-outs that remain unresolved. And, you know, we come to the same point of diminishing returns and trying to get down to perfect, dealing with parties that refuse to settle or promise to appeal.

And then, we note here, that there's one large claim, when you remove duplication, that has been disallowed and subject to appeal, and that's related to the 507

appeals. That's flagged so the parties can see that it's outstanding and that work needs to be done, as we did in the past fee allocation period, to preserve this Court's judgment up on appeal before the Second Circuit.

So, moving down to the second half of the page --

THE COURT: I'm sorry, what is -- is there a reserve on that one? And if so, what is it?

MR. FAIL: It is not --there is no reserve. It is an opt-out. So, there's no reserve for it.

THE COURT: Okay.

MR. FAIL: Down on the second half of the page, on the bottom, we go through claims that aren't receiving distributions to date, but nonetheless, are claims that could be entitled to 100 percent recovery, and that would need to be paid on or shortly after the effective date.

The first category are claims that could be entitled to share in a $3 million 1114 settlement. The number is, you know, very high in the number of claims that have been asserted, but they share pro rata in a pot of $3 million, so the liability is limited. In addition, this number of claims is high because a population that we were dealing with, of retirees or their widows, or widowers. You know, we looked and included here, claims that were asserted as general unsecured, claims that were asserted as secured, administrative priority, the gamut; but that could be

included in the universe that someone will have to reconcile to pay out at a later date.

The next section is broken out into two, but it's taxes. And a lot of work was spent in the lower section, in this past period, by the Debtors, to reduce both the number of outstanding claims, and bringing asserted amounts remaining down closer to the actual estimates that the Debtors have shown.

We removed from this chart, claims that were asserted for post-petition taxes and, in general, those have either been paid, or will be paid, and we may file an objection to clean up the docket. But this shows prepetition claims that remain outstanding. And so, you'll see a decrease in the number, and you'll see that we've already filed objections to get rid of certain claims. And since we filed this report, we've made further progress resolving even some of those objections.

After the tax line, we come to severance. This number is also increased, but the Debtor's estimate for the severance has not increased. These are folks that were severed prepetition. Their meeting amount of severance has not been paid. And so, the Debtor's have an estimate for it, and we've just increased the number of parties that may be eligible for it. And we filed some objections to other non-tax claims.

The secured line includes, primarily, in this giant number, parties asserting second lien debt, and the Debtors have agreed to defer fighting about that until the results of the second circuit appeal are known, to see if we can resolve it without further litigation or contemporaneous litigation and appeals.

The punchlines on this page are tremendous progress in reducing the number in getting the reserves down. You will note, Judge, on the bottom, that the estimated allowed amounts, after discount, has gone up slightly; we're showing $159.4 million, up from $153 million last time. And on the bottom right, you'll see the amount that we estimate that we will need to pay, is $106.1 million. It's up slightly from $99.7 from last time. The primary driver of the increase is an increase in the Debtor's estimate for potential liability they may have, for prepetition priority taxes.

The Debtor's prior estimates included everything to the best of their knowledge, based on books and records. Certain taxing jurisdictions are conducting audits. And the results of those audits are unknown and uncertain. And certainly, we're not admitting any additional liability, but we're flagging for parties that may be relying on this for other purposes, that there could be additional prepetition priority tax claims included.

I'll move to the next page, if that's okay, you have no other questions, Judge?

THE COURT: No, that's fine.

MR. FAIL: The next page, you know, is a waterfall recovery analysis; again, positive news. We're showing cash balances of 34.5 million, up from our last report, where it was 23.4. We're showing a dramatic reduction in reserves as a result of resolving disputed claims, and cleaning up for potential settlements that didn't occur. And that shows, remaining cash of $30 million, up for $17 last time.

In terms of the assets that remain to be modified, again, progress, that was described in the fee applications, and that Your Honor is seeing in various notices that were filed; there's 1.1 estimate in remaining real estate to come. It's down from last time, but because of the monetization of assets, that contributed to the increase in cash. The same with respect to other proceeds, which has come down, because assets were monetized and cash was received. So, the total remaining assets have come down from 42 to 28.8; it was a decrease of 13.1, but you'll see an increase of 17 in cash. So, net-net, the Debtors are doing well in terms of asset monetization.

The claims numbers here tie to page 2. And so, at the bottom, you see the potential difference between the cash available and the projected uses, excluding litigation-

based recovery from preferences and ESL litigation; is 62.6 million, up slightly, slightly, from the 58.2 in the last report; again, primarily driven as a result of the taxes that I mentioned earlier.

If Your Honor has no questions, I'll flip the page to 4.

THE COURT: That's fine.

MR. FAIL: Thank you. So, page 4 is the Debtor's announcement that as a result of the cash on hand, on cash expected to come in, the Debtors expect that they'll be able to make a fourth distribution of $17.7 million, on account of opt-in and non-opt-out administrative claims, before the end of March.

The chart below shows a $15.4 million would be allocated to those who would currently allow claims, with a reserve of $1.2 or $1.3 million being added to those that were forced withhold; because parties are still subject to preferences. And large driver of that are foreign defendants, where service has been difficult. And despite everything the Debtors have attempted to do, you know, continue to be drag.

Nonetheless, 17.7 is a tremendous distribution. A few ways you can look at that number, Judge: If you look at it as $17.7 out of the $53.3 million, which is what is owed today, that's one-third of what we would owe to those

administrative creditors. But it also, you know, is significant when you consider that it would get those creditors to the 50 percent mark of the allowed amount of their claims, pre-discount. That alone is significant. But when you consider that we only owe those parties either 75 percent or 80 percent of what we owe, you know, this distribution will get to two-thirds of what we owe them, or 62 percent of them; between 66 and 62 percent of what we would owe to those parties.

So, a significant distribution. The cash available is a direct result of the litigation and asset monetization that's occurred over the past period, that Your Honor is very familiar with.

The statistics that I just gave you, you know, would be a good baseline. The Debtors working with the Pre-Effective Date Committee believe that they might be able to do even more. And the Debtors, with consent and support of the Pre-Effective Date Committee and the UCC advisors, and the administrative claims rep, as well as the largest administrative creditor, are going to propose the following additions:

To the extent that we are able to pay that 50 percent mark, with the $17.7 million, we're proposing to allocate, roughly, $2 million, a little bit up, $2.3 million, to pay off and satisfy 199, close to 200, of the

440 opt-in and non-opt-out claimants that currently remain. So, again, we've described how we've satisfied the vast majority already. This would allow 45 percent of those administrative creditors to end their involvement with these cases.

We propose to do it by paying off de minimis creditors. Your Honor, in the past, for the earlier distribution, you recognized the benefit of, the administrative benefit that comes by making one-time payments, up to $15,000, to parties. We're now proposing, to the extent that funds are available, to pay off the 50 percent mark to everybody after doing this, everybody that would remain, to pay people that are owed up to $20,000 remaining in their opt-in and non-opt outs. And it would still allow us to pay 50 percent, up to 50 percent of the remaining creditors.

And again, we think that that that meets the goals of efficiencies for the cases, you know, ending parties' involvements, and maximizing future distributions. We're happy to have the support of the various constituents for it.

Because it is a deviation, you know, from the otherwise-established process, we would propose to submit a form of order on presentment to Your Honor. We don't think it's controversial, but this way we can get your blessing.

We're previewing it now. But the money is there to go out the door, one way or another, which is the good news.

The other item that I mentioned earlier, to try to conserve administrative resources going forward, the Debtors have gotten, you know, in credibly far in resolving claims; will continue to do so through the next distribution. After that point, you know, we'll consider, and probably dial back and not pursue, you know, litigation to the end on the few remaining disputed claims, and will wait and conserve resources. So, anybody that remains outstanding that wants to negotiate and engage, we would suggest now is the time to do so.

One other administrative savings that we have discussed, and have the support of the Pre-Effective Date Committee, as well as the estate's largest administrative creditor -- we think that we'll be able to pay off the 50 percent, up to the 50 percent; pay off the 45 percent of de minimis, and still have funds available to pay off close to 70 different taxing jurisdictions that have asserted prepetition priority real estate tax claims; that have asserted post-petition interest on those.

And the benefit of that would be to reduce ongoing administrative expenses of tracking, reconciling and updating and negotiating with those parties, as well as stopping the accrual of interest. The total cost would be

less than $1 million. Just as with the with the de minimis program, the Debtors would only go forward with that payment to the extent that we're able to meet the -- cross that 50 percent threshold. But we're happy to have the support of the various constituents for that. We think it will help reduce costs going forward.

Again, because that's a deviation from the current state of play, we would propose to include that in a proposed order, that we would file on presentment. And hopefully, have that dealt with at or prior to the February hearing, so that we could move forward, after that, to distribution.

Your Honor, the Debtors are continuing to work with the Pre-Effective Date Committee, the Administrative Claims Representative, State's counsel, the UCC and its counsel, on additional ways to advance these cases. The Debtors are doing everything, and have done everything that's within their control, to monetize the assets and then distribute what's available.

Additional assets, you know, remain held up, including, as a result of litigation, including with result to Transform; Your Honor is aware of the over $6 million that's being held there. And as well, as the reserves that are being maintained for disputed claims.

We're doing everything within our power to advance

it, and the result is the 17.7 that can go out the door by the end of March.

I'm happy to answer any questions, but that's the status report for today.

THE COURT: I just, I want to make sure I understood one point. You are suggesting that after that fourth distribution, that it's unlikely that you would engage in more negotiations on the relatively small number of still-disputed claims.

At that point, they're either going to sit there, or the Claimant needs to do something to bring it to my attention. Is that the, basically, the logic?

MR. FAIL: We would not encourage anything to bring it to your attention. The claims process remains in the Debtor's control. Certain parties have vowed to litigate to appeal. Your Honor is going to be faced, I think, today, with some that have gone on to appellate levels and Supreme Court cert. We're not looking to increase the cost.

So, they'll be dealt with as and when, you know, it's appropriate, when there's additional funds to pay for it, and it makes sense to do it. They know who they are. The objections are on file. There's -- I don't think there's anything to do, Judge.

THE COURT: Okay. Appreciate the update. Does

anyone have anything more to say on this, or questions about it.

MR. WANDER: Yes, Your Honor. David Wander of Tarter Krinsky, on behalf of Orient Craft. Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. WANDER: One question is, the Akin Gump law firm says they're owed $6 million. Is that added to the $62.6 million that needs to come in for the plan to go effective? Or does that get paid some other way?

MS. BRAUNER: Good afternoon, Your Honor. Sara Brauner, Akin Gump, on behalf of the Committee. The answer is no. The $6 million that I believe Mr. Wander is referring to, is the amount that we have disclosed continually in fee applications and at the prior hearing, and in our reply this time around, in respect of the jointly asserted causes of action; the ESL, and others' litigation. That is not reflected anywhere in this account. That is to be paid from the trust account, or any other funding obtained specifically in respect of that litigation.

THE COURT: Okay. Thanks.

MR. WANDER: With regard to the priority claims -- I'm looking at page 2, and there was mention about the retiree claims. Do those have to get reconciled for the plan to go effective? And who does the reconciliation of

that? And how long might that take?

MR. FAIL: They do not have to be reconciled for the plan to go effective. It's a fixed pot of $3 million to be share by those that are entitled to it. And whether it -- and I don't want to say I believe that it's the retiree representatives' job to deal with the reconciliation; the Debtors are not spending to do that at this time.

MR. WANDER: Is that the same with regard to the other, like the severance claims?

MR. FAIL: No, it is not the same with respect to the severance claims. Those are obligations of the Debtors, and the Debtors will reconcile those.

MR. WANDER: Okay. Thank you.

THE COURT: Okay. Very well. All right, thanks. Why don't we go on then to the next item on the agenda, which is a group of interim fee applications. I've reviewed --

MR. FAIL: Oh, that's right, Your Honor --

THE COURT: I'm sorry, I didn't mean -- to say as a preface, I've reviewed the fee applications, the statement by the fee examiner, about them, and the objection to three of them, by Orient Craft, and the responses by Weil Gotshal and Akin Gump to that objection.

MR. FAIL: Thank you, Your Honor. I propose to just request, on behalf of all of the applicants, that Your

Honor grants the applications without further -- without anything further. And I'm happy to answer any questions, and I'm sure the other professionals are as well but …

THE COURT: I, as I noted, I've reviewed the Examiner's status report, which is dated January 13, the Fee Examiner's report, that is. And, let me just, whether it's Mr. Harner or his counsel, is there any update to that, or is that the most recent view of the Fee Examiner on these interim applications?

MS. DALUZ: Your Honor, this is Tobey Daluz from Ballard Spahr on behalf of the Examiner. Mr. Harner is also on the line. I knew he wanted to address any questions from the Court. But since he hasn't yet turned on his screen, I will say to you, there is no further update from the report that was filed just a couple of days ago.

THE COURT: And I'm assuming that the applicants have no problem with including the same language in an order here, that has been in the prior orders, regarding the Examiner's rights; which he also addresses in paragraph 8, the last paragraph of his status report; basically, preserving all the objections that the Examiner would have, in light of the ongoing process in considering the Examiner's review and proposals and discussions with the firms.

MR. FAIL: Garrett Fail for Weil, Your Honor.

Weil has no issues, and I haven't heard from any other professional. I presume that there's no issue. It's been in every order since, and we're happy to accommodate the Fee Examiner in this request, and going forward.

MS. DALUZ: Confirmed with the UCC as well, Your Honor.

THE COURT: Okay, thanks.

MR. HARNER: Apologies, Your Honor, I was having trouble turning back on my video and audio, but Ms. Daluz is completely correct; that's exactly where we stand.

THE COURT: Okay. And this is also some of what I will reprise from the last hearing we had on interim fees. Is it fair to say that the Examiner's view is that, given the size of the firms, the nature of the ongoing work they're doing, and consequently the holdbacks -- in relation to those tasks -- and the sort of estimated amount of future bills that, at this point, no holdback is warranted?

MR. HARNER: Your Honor, what I would say about that, is that I think that the holdbacks are not necessary, because the (indiscernible) can be done, you know, given the size of the firms.

What I would say is that, given the administrative insolvency gap in the case, which has been discussed at some length today, is that some of them, you know, or all of them may need to think about whether or not there needs to be …

You know, all these firms have made a lot of money on this case. And I don't mean to disparage them for that, but it may need to be the case, actually, that the law firms, as well as -- or the professionals, generally, as well as everybody else, need to think about whether or not to take a claw back from what they've earned her, to try to close that gap.

MR. FAIL: This is Garrett Fail from Weil, on behalf of Weil. Thank you, Mr. Harner for that thought. But I would remind the Court that the Debtors have paid out over $5 billion in administrative costs, to various administrative claimants that aren't professionals. And that the report that we just showed includes, and highlights that we paid out, to date, you know, $50-something million to prepetition creditors; included in that are the pre-petition administrative creditors.

So, the work that's been done and the applications that have been filed are for post-petition work, at the rates that were approved, and on the terms that were approved. And the professionals have not agreed to fund a deficiency for prepetition creditors, or post-petition creditors. So …

THE COURT: I think we're covering two different issues. The issue I was asking Mr. Harner about was whether there should be a holdback at this point; which really goes

to, in my mind, concerns about the ability, if I determine, ultimately, that some portion of fees and expenses that was paid on an interim basis, should not be paid on a final basis, and there isn't enough unpaid amounts for future periods to set off against that determination.

And I think I heard Mr. Harner clearly that the firm's financial health, and his view of what the range of potential -- a ruling like that by me, would be that, it wouldn't warrant a holdback, beyond the 20 percent holdback under the fee order.

As far as a final fee application is concerned for each of the firms, I think that's a separate issue. Namely, separate and apart from the merits of the applications; whether the firm should consider any reduction in order to enable the case to go effective. And that's really for a future date. I don't view that as an interim fee issue.

MR. FAIL: Right, Your Honor, I just want to be very clear that at each of these interim steps, this has been --

MR. HARNER: I'm so sorry to interrupt --

MR. FAIL: -- one party or another.

[OVERLAPPING SPEAKERS]

THE COURT: I'm sorry, you two are talking over each other. I just want to -- why don't we let Mr. Fail finish.

MR. HARNER: I'm so sorry to interrupt Mr. Fail, but, you know, on those two different issues, I do completely agree that there is no reason to oppose an additional holdback point. As I have said several times, (indiscernible) if there is, ultimately, a (indiscernible) imposed by the Court. So, I'm not worried about that.

The only other separate issue I was raising, was whether or not, you know, given the administrative expense gap, these firms are (indiscernible) some reductions and try to close that gap.

THE COURT: That's a fair point. That's been hanging over the case since the confirmation hearing, frankly. But I think it's premature to deal with that now. I know that -- or I trust that, at least -- I'm pretty sure I know that also -- that the firms, and the administrative expense creditors, are aware of that gap acutely; that's why we're having these reports at every omnibus date.

And there are substantial assets out there. There's substantial litigation pending, big ticket litigation pending. And so, I think it's premature to do that. I mean, in smaller cases, firms often make some accommodation to enable the plan to go effective. But --

MR. HARNER: And, Your Honor, I couldn't agree more. But that's -- I just wanted to raise the issue, but I also did not want to disagree with Mr. Fail, or any of the

other professionals, that there's no point, at this point, in opposing an additional holdback. I just think it's worth it.

THE COURT: All right. I guess the one other question I have -- in looking at the time records, I don't get this impression, but I just want to make sure there's no, like lingering professional out there that's billing, that at this point, really shouldn't be. That's not my impression that I'm getting; that the firms are doing the work that needs to be done, and not -- you know, the professionals that were on monthly fee compensation arrangements, have either stopped or have substantially changed those. So, I just want to make sure that's the case. I don't want there to be some lingering firm that's --

MR. HARNER: I'm going to ask my colleague, Ms. Daluz, whether or not she will confirm that, but I believe that to be the case.

MS. DALUZ: Your Honor, I agree that not only are the number of fee applications, but the size of the fee requests have been decreasing each quarter, as we would expect to see at this stage in the case. We do not think that there is any -- I think, off the top of my head, any particular firm that we think may be billing beyond what we would expect. And if we do see those kind of anomalies, we

are raising them in our preliminary reports and discussing it with the individual firms.

THE COURT: And again, I read the fee applications. I can get a pretty good sense of that too, but I, obviously, am not discussing it with the firms, about their staffing, but that's something that you all are free to do.

MS. DALUZ: Yes. And often, Your Honor, now we don't draft full-blown preliminary reports. We are kind of producing just a short form schedule to go through with law firms; as opposed to doing full-blown, you know, legal diatribes, as we did in the -- as we thought was necessary in the early stages of the case.

THE COURT: Okay, very well. So, the fee applications, interim fee applications by Prime Clerk, as administrative agent; Herrick Feinstein is conflicts counsel for the Committee. And the Fee Examiner and his counsel aren't opposed. I've reviewed those, and I think I can see why there were no objections to them, and I will grant them on an interim basis with the reservation of rights language that we've had for the Fee Examiner. And obviously, it's being done on an interim basis for everybody.

The interim applications by Weil Gotshal, Akin Gump and FTI, were objected to by Orient Craft. I had dealt with a very similar set of objections to the same firm's

compensation the last time this was up, which was September 27, and denied the objection. And I'm not sure, really -- I went back and reviewed the transcript, Mr. Wander, and in part, you were doing it to reserve your rights, although everyone's rights are fully reserved. I have no problem with your doing that, but I'm not sure there's anything new in this objection from the issues that I considered last time.

MR. WANDER: Your Honor, David Wander of Tarter Krinsky on behalf of Orient Craft. I'll be very brief.

There is not that much new except another four months have passed without the plan going effective. And I am heartened by Mr. Harner's comments.

On behalf of my client, who is an opt-out creditor, the Debtor's status report paints a different picture than forward progress; because for those who opted out, the bottom line is, how much money is needed for the plan to go effective? And apparently, there are additional tax claims that have arisen, and the bottom-line number of how much money the estate needs to go effective, has gone up by $5 million.

So, the progress that's made to administrative creditors who are going to get some money from the next distribution, does not incur to the benefit of those who opted out. And if Your Honor may recall, you know, it was

predicted that the plan would go effective in six to 12 months.

But I appreciate Your Honor letting me make these comments. And that's all. I didn't expect that Your Honor was going to grant my application, but with four more months going by, and us no closer to an effective date -- and that's what's been missing from the discussion. We all know that the preference recoveries will not come close to bridging the gap. And that's what we told was going to get us effective.

And the big litigation has been at a standstill for a year and a half. And I'm concerned what happens when Your Honor moves on. So, that's why I wanted to file the objection, to keep my comments in the forefront, and we'll see what the next four months brings, Your Honor.

MR. FAIL: Your Honor, just briefly, because I fear this will appear again in three months and then, possibly, after you get to leave this behind and we are stuck with it.

It is just simply false to say that we are not closer. At the last hearing, the applications included time to distribute $10.5 million. Here we are in the third distribution. Here we are talking about giving out $17.5 million. We have reduced the administrative claims. We've given out more. And he's an opt-out creditor. So, he'll

get paid before the prepetition taxes.

It's absolutely false to say we're no closer, or to blame the Debtors for updating their estimates on prepetition taxes subject to, that have been subject to reconciliation. We've delayed the reconciliation to deal with the admins first, and they'll be what they'll be. But it is absolutely just false and misleading, and we're all tired of hearing it.

THE COURT: Okay. Well, I believe that the update, basically, as the prior updates have sown, is that pending the effective date, the Debtors, with the assistance of the Committee, have been doing the work that a post-confirmation trust would normally do, to enable distributions, which would generally have been held back -- because of disputed claims, because of realizing on assets that hadn't been turned into cash yet, and the like.

So, I think that work is all productive work and has actually, I think, led to some significant increases in the estimates.

Mr. Wander is right in that the preference recoveries were considerably lower, and are projected to be considerably lower than they had been projected to be at the confirmation hearing. But those were not the only sources of recovery here. And I think people knew that at the time of the administrative claims settlement.

And the major litigation, the ESL litigation, is clearly something that has a big ticket on it, and is also tied up in a major portion of the remaining uncertainty here, as far as other related litigations between those parties. And that will move ahead, and needs to be dealt with very carefully, so that all the parties' rights in those disputes are dealt with properly.

I don't see a reason, I guess, therefore, to have any holdback for these three firms, whose underlying work is not -- for this period -- has not been objected to in any -- as far as the substance under Section 330 standards are concerned.

The work is necessary to get to the point to make the distributions to creditors. And I guess it's that simple. And in large measure, it's carved out of the Secured Creditor's collateral, provided for in a fund under the plan, for litigation; which the Committee has agreed not to tap in full. And therefore, I don't believe there is a basis to either holdback or disallow some portion of the requested fees in these interim applications.

MR. FAIL: Thank you, Your Honor.

THE COURT: So, I'll ask the Debtors to submit the one order, with schedules A and B, for the six applicants. And it will get entered shortly.

MR. FAIL: The next item on the agenda, then, is

the motion to enforce an order authorizing assumption and release -- assumption and assignment of a lease with MOAC Mall Holdings, LLC.

THE COURT: Could I --?

MS. MORABITO: Excuse me, Your Honor. Sorry, I hate to interrupt like this, I'm sorry.

THE COURT: That's fine.

MS. MORABITO: This is Erika Morabito at Quinn Emmanuel, on behalf of the Admin Expense Claims Representative. I'm just wondering, there's many of us on the call that were dialing in, in case Your Honor had questions with respect to agenda items number 1 and 2. And we would ask permission to be able to drop now, if that's okay with Your Honor?

THE COURT: Yes. That's fine. In fact, I was about to interrupt Mr. Fail to say that everyone should feel to drop off if they're not involved in what I think is actually the last matter on the calendar; which is this Transform, Mall of Americas matter. Because I think the matter that had been on the agenda, which was an order to show cause related to one of the adversary proceedings, has come off. I just want to confirm that, that the K-Mart versus Grace and Son Construction Company is not going forward today?

Okay. So, if anyone was on for that one, they

don't need to stay on either.

MS. MORABITO: Thank you, Your Honor.

THE COURT: Okay, very well. So, let's go back to the Transform Hold Co.-MOAC Mall motion.

MR. MARTIN: Good afternoon, Your Honor, this is Craig Martin from DLA Piper, representing Transform. Can you see and hear me all right?

THE COURT: Yes, fine, thanks.

MR. MARTIN: Thank you, Your Honor.

MR. OTSUKA: Good afternoon, Your Honor. This is Greg Otsuka for MOAC Mall Holdings. Also with me on the Zoom hearing is David Dykhouse of the Patterson Belknap Firm. Your Honor, I would just note that I filed my pro hac vice application on January 10. I have not seen an order yet granting that motion, but I would ask the Court's permission to appear and argue today?

THE COURT: Okay. Did you email it to chambers with a proposed order?

MR. OTSUKA: I did, Your Honor.

THE COURT: Okay. It's probably already been sent, or if it won't, it will get entered very shortly. So, you can certainly argue today.

Okay. I have reviewed the pleadings related to this motion. And the first one is Transform's motion to file portions of its motion under seal. The parties didn't

exactly file my procedures for a ceiling motion; namely, to provide me, by email, with the motion, the unredacted document and the proposed order. But I've reviewed the unredacted documents and the redactions. And I'll note that I don't believe there is any opposition to the sealing motion, and that, in fact, MOAC has tried to comply with the relief that was sought, but redacting certain portions of its objection.

So, my inclination, unless anyone has anything more to say about this, is to enter an order directing the sealing of the motion papers and the objection, and having the redacted versions be the only versions on the public docket of the case.

Those types of orders are always subject to someone's seeking to reopen the matter. But frankly, this is not particularly a matter of public note. I think it really does fit very cleanly into what 107(b) generally deals with, which is commercial information; the disclosure of which could put a party at a disadvantage.

And so, again, I'm inclined to grant the motion. Does anyone have anything to say about it?

MR. MARTIN: Your Honor, this is Craig Martin. Mr. Otsuka and I did confer prior to the hearing, and we're grateful for Your Honor inuring that; we thought you might, in lack of the opposition. And we think that we can conduct

the hearing without any need to seal anything that we're going to argue today. So, I'll simply refer to the subtenant as 'Subtenant.' And much of what we needed to redact, is not going to be relevant for today's hearing; if it is, we'll address it. But we did confer, and I think we can cover it without sealing the hearing or any portion of the transcript.

THE COURT: Okay, very well. So, I'll ask you then, Mr. Martin, to email the sealing order to chambers.

MR. MARTIN: We will do so after the hearing, Your Honor. Thank you.

THE COURT: Okay. So, then we have the underlying motion and the opposition. I guess, the first thing I want to ask is, has there been any development on the motion for a stay under Federal Appellate Rule 41 of the issuance of the mandate?

MR. OTSUKA: Your Honor --

MR. MARTIN: Go ahead, Mr. Otsuka.

MR. OTSUKA: Sorry, Your Honor. Greg Otsuka. The only development is that, that motion is currently in briefing in the second circuit. We filed the motion. Transform has filed the response. We have time to file a reply. But as of now, that motion is pending.

THE COURT: Okay. All right. So, I'm happy to hear brief oral argument on this. I guess I'd like the

parties to focus first, though, on the stipulation and order from the District Court, so ordered in March of 2020, by then Chief Judge McMahon, and how it affects the motion now before me.

MR. MARTIN: Yes, Your Honor. If it pleases the Court, I'd be happy to go first on our view on that.

THE COURT: Okay.

MR. MARTIN: Craig Martin, again, for the record. So, our view on that is -- and I think if you look -- it's important to understand the context in which that order was entered. Initially, we argued in front of the District Court, the substance of the motion, and MOAC prevailed on that. And that consent and stipulation order was then entered.

After it was entered, we then filed a motion for rehearing, which was granted. That resulted in MOAC filing an appeal on the rehearing motion, and that's what we argued to the Second Circuit Court of Appeals.

The problem with the consent order is that in paragraph 2, it says that it would be, remain in place until the Second Circuit Rules, which has occurred. As MOAC points out in their briefing, I believe it's paragraph 6, says that that order would not terminate until the mandate issues.

THE COURT: Paragraph 5.

MR. MARTIN: Yeah, paragraph 5, I apologize. I think the key is, is that in the actual Second Circuit judgment, in their very last footnote, they talk about how, because of the way in which the District Court judgments and orders were entered, there never was a judgment entered. And that as a result, that consent and stay order ceased to have effectiveness.

Because, the way I read their footnote is, number one, it related to the original judgment of the District Court, which was vacated by the order on the rehearing. And number two, because under the various rules of procedure, had a judgment been entered by the District Court on the rehearing order, that judgment wouldn't become final in 150 days; which time has passed. And the consent order would have lost its efficacy.

So, our view is that for those two reasons, indicated by the Second Circuit in its footnote, in its summary order, disposing of the matter, the consent order and stipulation does not have any effect any longer.

And if Your Honor needs me to direct it to you, would be happy to --

THE COURT: Well, I'm looking for it here. Can you just read it? Rather than my leafing through here, can you read that note?

MR. MARTIN: Yes. I'm reading from Exhibit F of

our motion. It's the final page, footnote 3. It's quite a long one. But in essence, it says that the District Court's May 11, 2020 order granting Transforms motion for rehearing, and vacating the Court's original decision in favor of MOAC, in its June 8, 2020 order denying MOAC's motion for rehearing, and directing the District Clerk of Court, in effect, to close the case; together constitute a final decision that, quote, "Ended the litigation of the merits and left nothing four the Court to do but execute the judgment." Citing Hall v. Hall, in 28 USC 12 91. Parenthetical omitted.

Continuing. We appreciate that on March 11, 2020, the District Court entered a stay of what it described as its initial judgment in favor of MOAC. The District Court may well have thought that the stay remained in place, after it later granted Transform's motion for a rehearing. We note, however, that no judgment of the District Court was ever actually set forth in a separate document at any point. Of course, in the absence of a separate document, judgment is deemed entered 150 days after the order from which the appeal lies and is entered, citing Federal Rule of Civil Procedure 58(c)(2)(B). But we will repeat our strong suggestion that where, quote, "The district Court makes a decision intended to be final, the better procedure is to set forth the decision in a separate document called a

judgment." Citations omitted.

That's the complete footnote, Your Honor. So, as we read that, as I say, we believe the Second Circuit is pointing out that the consent stay and stipulation expired by operation of the Federal Rule of Civil Procedure governing final judgments issued by District Court, up to the Second Circuit.

THE COURT: For one of jurisdiction, in essence, I guess, right?

MR. MARTIN: I suppose so. You know, you always to hate to second guess anything any party's done. But certainly is MOAC is concerned about a further stay, they could have sought that from the Second Circuit.

And that's why I wanted to put that consent stipulation in context. It was originally entered on a motion in which Transform had lost the appeal. And so, the design behind it, in my mind -- Mr. Otsuka may disagree -- but it was to protect us form not being able to continue to pursue subleases. Of course, we've now obtained a sublease. And then, when the rehearing happened, neither party did anything with respect to that. And I construe the Second Circuit is saying, because of neither party doing anything, and because the District Court didn't enter any judgment, to the extent that stay remained valid, it expired under Federal Rule of Civil Procedure 58, 150 days after the

District Court's judgment. And that time period passed long ago. The appeal was pending for quite some time in the Second Circuit.

THE COURT: Okay. Mr. Otsuka, you want to address that point, and then we can go onto the other ones?

MR. OTSUKA: I would Your Honor. Thank you. A few points: The first is, except for the first sentence or two of Mr. Martin's argument that he just made, none of that argument appears in their briefing. We raised this issue in our response.

In their reply, it's one paragraph on page 7 of the reply. And they hang their hat on the phrase in paragraph 2, of this order that says, "Until any ruling of the Second Circuit of Appeals."

So, the first point is, the rest of that argument has not been made and should not be allowed right now.

In any event, the order of the District Court says, "Judgment of this Court shall be stayed." It doesn't refer to any -- the judgment that was just entered, at the time of this order. As Mr. Martin pointed out, after Transform lost on the merits in the District Court, they asked our consent to enter into this stay. And it was only after we agreed and then -- that the Court entered this stay.

And then, the very next day, Transform, for the first time,

raised this jurisdictional argument; which as we point out in our papers, they assured this Court that they would not make it on any later appeal. So, in our view, this order clearly stays the judgement of the District Court. It doesn't refer to only the first judgement, and moreover, it is also clear that the say is in place until the sending down of the mandate of the Second Circuit, which hasn't happened.

THE COURT: I -- I agree with you on those points. I think that if you just stopped in paragraph three, I wouldn't, but it seems to me that paragraph five is -- is in keeping with what you just said. But, I guess that leaves the issue addressed in the footnote to the Second Circuit's decision, which is I think a pretty strong indication that the Circuit doesn't believe this stay is in effect at this point.

MR. OTSUKA: Well, I would also say, Your Honor, that it was a footnote after -- I think it's a footnote to the word affirmed. So it's clearly dicta. They don't say --

THE COURT: It's from the Second Circuit.

MR. OTSUKA: I -- I understand.

THE COURT: I'm not that pretty -- I'm not that eager to just ignore it.

MR. OTSUKA: And I'm not suggesting that you

ignore it, Your Honor. But I also point out that they don't come out and say this order is not effective. They -- they -- they -- they make comments about the order --

THE COURT: No, but the do -- but they do say the judgement is -- is -- that in essence it's -- it's done. Now they -- I think they can reconsider that, or rethink that as part of the briefing on the stay of the mandate, the requested stay of the mandate, but -- but at least as far as what I have before me right now, it doesn't seem to me like they would be holding the parties to this stipulated order.

MR. OTSUKA: Well, the other point I would make, Your Honor, is whatever the judgement -- whatever the effectiveness the judgement may have, the terms of this order say that the stipulation made itself, shall remain in place until the standing down of the mandate. What we're -- what we are relying on is in paragraph three, that Transform shall not do a number of things, and as long as the mandate is not issued, this stipulation remains in place and Transform shall not do all of those things that are identified in paragraph three.

THE COURT: Well, again though, but if -- if -- if the -- the court that so ordered it can't enforce it, I'm not sure that means anything. But let me ask a related question, and this is to both of you. The -- the sublease has a -- a provision that talks about when the lease term

commences, Section 1.2, which refers to the litigation resolution date, and then that definition of litigation resolution references another definition, the "critical determination". And regardless of whether this -- this stipulation is a binding order; this is really I guess a question for Mr. Martin first. Why isn't the lease -- the sublease itself one that contemplates the term commencing only when you have a final order, as people define final orders, i.e. it -- it doesn't admit of any rehearing, reconsideration, transfer or appeal, and any further possibility of any stay, remand, removal, rehearing, reconsideration, transfer, or appeal resulting in the critical determination; and I guess, in light of that, given that there is a pending motion under Rule 41D to stay the mandate and the possibility of a cert petition after that. The -- the relief you're seeking here, ultimately, it would occur to me doesn't -- doesn't -- doesn't -- the lease doesn't start -- the sublease doesn't start until that process is done. So, I guess ultimately the question I have is why are we here at this point?

MR. MARTIN: Yes. Craig Martin, again, for the record. I don't disagree with the way that, Your Honor, is reading it that the litigation resolution is the date by which various events would begin to occur that would lead to occupancy. The reason we're here today, however, is because

of the assignment order that, Your Honor, entered after our trial, ECF Number 5074 had certain conditions in it that we needed to satisfy within certain time periods.

The two that we're worried about, specifically, and that we submit we have satisfied, is that the -- we've given the MOAC in it's capacity as a Landlord it's rights under Section 6.3 of the Master Lease. And the second item that we're concerned about is that, Your Honor's order, signed an order required that we at least lease some portion of the property subject to the Master Lease.

THE COURT: Well, except it really wasn't -- I -- I read that provision a little differently than -- than I think you do, and maybe you're being extra careful about it. But -- and I -- I go back to the transcript. The -- the two year limitation came up because this was a very long term lease and there was 70 more years left to run on it. And --

MR. MARTIN: Correct.

THE COURT: -- under the case law, I was concerned that if it just remained -- if you said to, or left MOAC to believe that you were perfectly content to leave the space empty for 70 years, they would be forced to pay you something and I didn't believe that was right under the case law. And during oral argument, one of your colleagues, counsel for Transform, said well, we think we will get it leased within two years. That's a reasonable time. There

was testimony to that effect and so long as the landlord didn't block us from doing that. And obviously that testimony and the two years didn't take into account two years of appeals.

MR. MARTIN: Or a -- or a pandemic -- global pandemic.

THE COURT: Well, that's a separate issue. I -- I really, that -- I mean, it was on the condition that the landlord not interfere. And, you know, it's my order. It's my -- I understand my logic behind it and the logic was to give you all two years to lease it, starting when you had the opportunity to do so. Not, you know, two years would run while you were prevented to do it. It seems to me that that type of relief, if the circuit does not grant the -- issues the mandate, does not grant the stay, makes sense to fix that. I mean, it's just contrary to the premise of the order that, again, was that when your hand is free, you should have two years to litigate. It wasn't a question of, you know, the landlord, you know, like telling perspective tenants not to talk to you. I mean, that would have been interference. But the concept was you had two years to do it. Not that you would have two weeks to do it after two years of appeal -- a year and -- almost two years of appeals.

MR. MARTIN: Yes. Craig Martin again, Your Honor.

And just to comment on that, and I -- and I appreciate what you're saying because it sounds like what you're saying that we might have two years from the completion of appeals, which, obviously --

THE COURT: Right.

MR. MARTIN: -- would be much more time --

THE COURT: That's right.

MR. MARTIN: Our concern obviously was calculating it from the entry of the order --

THE COURT: Right.

MR. MARTIN: -- put us -- actually put us into September of last year. We -- you may have seen in the documents we submitted, we did as --

THE COURT: You got an extension from the Second Circuit.

MR. MARTIN: Yeah, we did ask for 60 days after their ruling, and they gave that to us. We calculate that to be February 15th, so obviously this is a very valuable lease. We don't want to take any chance that we somehow lose this -- this piece of property that we acquired due to the passage of time. So --

THE COURT: Well --

MR. MARTIN: -- obviously our proposed form of order has a paragraph 3C that says that we've satisfied the contingency by entering into the sublease so that we don't

have to worry about the two year time period.

THE COURT: Right, but that's -- that's a good -- see that's why I think our interpretation's a little different. It's not really satisfy the contingency; it's just saying that this was -- that deadline was not -- I didn't contemplate that deadline under these facts. That's it --

MR. MARTIN: Okay.

THE COURT: But -- then I -- I guess I want to go to a related point. The Circuit already gave Transform extra time, visa ve the lease. It has before it a motion for a stay of the mandate. Any court, including the Circuit, can condition stay on various things. They condition it on posting a bond, if there's a risk, for example, you lose the sublease, just because there's a -- a circ petition pending. And so the Circuit could say well, we'll grant the stay if you post the bond. It could also say we'll grant the stay as long as the two year condition is extended. And you could certainly related to them this section of the transcript where I say that's, you know, how I viewed my order and it comes right out of the oral argument and the discussion that you should have a full two years to market and sell the lease, or to, you know, as a sublease.

Given that that's in front of the Circuit already,

with those possibilities, I'm -- I am reluctant to just charge ahead before they rule on the motion for a stay of the issuance of the mandate.

MR. MARTIN: I understand that point, Your Honor, Craig Martin, again. So it sounds like that potentially two things that might, Your Honor's read the papers and I'm not going to make a pitch for why we think the current order is final. I understand where, Your Honor's coming from, it seems like there are two options that might help solve the problem. The first would be to invoke the rules in Your Honor's court and set this for a final hearing. The reply brief is due on the 25th and is on the -- is on the 25th, so, you know, we would expect a ruling from the Second Circuit on the stay of the mandate probably by the end of the month, early February. But since we're concerned about that timeline, it may make sense to invoke a Bankruptcy Rule 8005. There's also a Federal Rule of thought procedure called Indicative Ruling --

THE COURT: Well that's it -- that's actually 8008 has the Indicative Ruling.

MR. MARTIN: 8008? I'm sorry, I misspoke, yeah. Called Indicative Ruling, which allows us to do what, Your Honor, just said, which is to, you know, write a letter to the Clerk, and say that we had this hearing, provide the transcript, and say that you've indicated your thoughts on

this record. I guess the one portion of that rule that's not clear from this record is whether you would actually grant our proposed order or whether you would clarify the two year time frame to be two years from completion of, you know, exhaustion of appeals, which would either be when the mandate doesn't issue, I suppose, or if the Second Circuit stays the mandate and the Supreme Court grants Cert -- it could be, you know, we all know how long that takes, it could be another couple of years. We just don't want to lose our lease while that -- that time is pending; and I'm -- as I'm sure, Your Honor, appreciates, there's some confusion over when that deadline runs. We -- we believe we've satisfied the requirements with the 6.3A offer as, Your Honor has seen in the exchange of letters from November and December, and that we've satisfied the contingency. But --

THE COURT: Well --

MR. MARTIN: -- if, Your Honor, feels the mandate issue prohibits you from -- from addressing that --

THE COURT: Well, there are two aspects of the condition to the -- to the start of the lease. There's the litigation contingency, and then there's the compliance with the right of first offer, and compliance with the lease itself. And you -- your motion duly seeks determination of both of those points. The objection was premised almost

entirely on arguments why the first point, i.e. the litigation contingency, is at best is premature, and at worst something that I don't have the power to rule on. There is a little bit in the objection about the second point, which really said very little -- really it didn't say anything more than the language in the denial letter, which basically questioned whether the proposed subtenant fits within 6.3 and is the type of tenant that can come in. I don't think I'm in a position to give any indicative ruling on that point yet, because I don't really have any evidence other than is submitted in a motion as to the nature of the subtenant's business. It may be fairly easy to decide that issue, but I'm not sure I'm -- I can't give an indicative ruling, I don't think, on that point.

I know you think you've made that case pretty clearly, based on other leases that MOAC has granted, et cetera, the nature of this subtenant's -- proposed subtenant's business, et cetera, but -- but it's a different issue than interpreting my own order, which is really the first point.

MR. MARTIN: Perhaps the owner, Craig Martin again, may by -- may be some combination of what I said, which is that we make the Second Circuit aware of this and we also adjourn this motion, pending the decision on the mandate, and if the mandate is not stayed, we could then

seek a further hearing on these other issues and with the clarity on the timing, we're then not, you know, pressed for some arbitrary deadline where we need that decision or we'd (indiscernible) the lease (indiscernible).

THE COURT: Right. Well, I don't want to short circuit, Mr. Otsuka may want to -- may have some remarks on this. I don't to short circuit the arguments that MOAC has made, but I did -- I did want to give you both my preliminary thoughts on the divestiture issue.

First, I don't think that the mandate is -- the issuance of the mandate is to be ignored. I think it is a critical step in the appellate process, and until it's issued, with -- with very limited exceptions, the -- the lower court, I don't think has the ability to take an action that would interfere with the appeal process, and I think that's -- that's laid out pretty clearly in the case law on the jurisdictional law. It's discussed in United States v Rivera, 844 F.2nd, 916, 921 (2nd Cir. 1988), and I think even more tellingly in, I wouldn't even try to pronounce it, Y L U G H I O U G H E N Y, an Ohio Coal Company v Milliken, 200 F.3rd, 942, 951-52 (6th Cir. 1999) or a hearing on merit denied 2000 US opt Lexus 3382, 6th Circuit, March 2, 2000. Cert denied 531 US 818, 2000.

The Abner Coleman case that the reply mostly relies on for the statement that the lower court can act in

certain circumstances where the mandate hasn't been issued yet, was one where there was no request for a stay of it, and the district court was up -- up against the speedy trial issue. I think Deep v Boys, which -- which the reply also relies on, pretty much sort of blindly cited the Abner Coleman case with a broader proposition, and the -- the Sixth Circuit case says, yes, even though ministerial, it does have a meaning and I think, particularly where there is a motion for a stay of the mandate, that's important and that take is laid out in the advisory committee notes to Rule 41D. But I'm not sure that gets MOAC to where it wants to go here, because I'm not sure that the divestiture doctrine really applies in this situation, necessarily. There's a good discussion of it in Ray Winimo Realty Corp, 270 BR 99, SDNY 2001, also citing that and later cases in another district court opinion Ratcliff v Rancheros Legacy Meat Company, 2020 US District Lexus 127, 276 at 9 through 10, District Court Minnesota, July 2021; as well as by Judge Chapman in Ray Sabine Oil and Gas Corp 548 BRF 674, 679, Bankruptcy SDNY 2016.

So the -- the point there is that the mere fact of a pending appeal doesn't divest the court of jurisdiction to implement and enforce the order. That flips the burden of getting a stay, pending appeal on its head. You wouldn't have to move for a stay pending appeal, if the very fact of

and appeal divested the court of implementing the order it's being appealed from. Instead, the rule makers said no, you have to rule for a stay, pending appeal and win before that happens. What -- what you can't do, under the divestiture doctrine is expand on, or alter the order that's on appeal, or interfere with the appeal. And I -- I think that's an important point. Now, my order authorizing the assumption and assignment of the lease from September 5, 2019, which has the two year limitation in it, isn't really, I don't think the subject of the appeal.

I think the subject of the appeal is the -- the district court's determination that 363M deprived it of the ability to reverse my order. On the other hand, this matter is before the district court -- I mean, I'm sorry, it is before the Court of Appeals in the Motion for Stay of the Mandate. They have the ability to condition that request on various things and I think it would be useful for the District Court, for the Circuit Court, excuse me, to -- to know my view of that two year limitation. And I think I have the power to, through you, to let them know of that view under Bankruptcy Rule 8008, which says that if a party files a timely motion in the Bankruptcy Court for relief that the Court lacks authority to grant, because of an appeal, that has been docketed and is pending. The Bankruptcy Court may defer considering the motion, deny the

motion, or state that the Court would grant the motion if the court where the appeal is pending remands for that purpose, or state that the motion raises a substantial issue. And then B says the movant must properly notify the clerk of the court when the appeal is pending, if the Bankruptcy Court state that it would grant the motion or that the motion raises a substantial issue.

And I think I would grant as modified, the motions request with respect to the two year period, but really, by saying that I don't believe that it applies, under these facts, not because of anything wrong that MOAC did, but because the premise of the two year limitation was that two years was a reasonable time, if Transform was free to do so, to find a tenant. And if it couldn't do so, by that point, adequate assurance would require that it not hold onto the lease anymore.

MR. OTSUKA: Your Honor, I didn't want to interrupt. May I be heard on --

THE COURT: Sure. Yeah, go ahead, no I wanted to lay that all out on the table. That's not a ruling. I want to lay out my thinking so that you all can respond to it.

MR. OTSUKA: Your Honor, on the two year point, I certainly understand that the Court is maybe giving more color describing the Court's reasoning for why the order is entered and it may be interpreting the Court's own order. A

couple of things that I would point out, however, in terms of if the Court is inclined to say that the two years doesn't begin to run until any appeal is final, whatever that may mean. Obviously, Transform has been marketing this sublease during this time. That's why they have a signed sublease, right? So it doesn't make sense to me that they should be given two more years when they have spent this time, at least, some of it, probably most of it, marketing and -- and looking for a subtenant, which they believe that they have found a suitable subtenant.

THE COURT: Right.

MR. OTSUKA: So --

THE COURT: That -- can I interrupt you? That's a fair point, but at the same time it has to be enough time so that the deal can be closed -- or a deal can be closed after what would be a reasonable condition, which is that the prospective subtenant is reasonably assured that after it closes, it won't be divested because of some further ruling on appeal. So, I understand.

MR. OTSUKA: It --

THE COURT: Another two years is -- my point is that the debtor, Transform shouldn't be up against a, you know, an imminent deadline here, because of not its own inability to market the premises but to close, because of the pending appeals.

MR. OTSUKA: And I understand that, Your Honor, and I would also point out, as Mr. Martin said and as the Court recognized, the Second Circuit did extend that two year period, and that was with the consent of MOAC. Transform has not sought -- has not asked the Second Circuit to extend that deadline. Maybe with the Court's comments today, it may do so, but my only point is that that request to further extend that deadline has not brought to MOAC, I'm not sitting here today with an answer to that.

THE COURT: Right.

MR. OTSUKA: But my point is, we did consent for that very reason, that Your Honor is pointing out. We consented to the -- to the Second Circuit extending the deadline out another 60 days. So I guess that's all I would say about the two year time period.

THE COURT: Okay. All right.

MR. OTSUKA: In -- in terms of the jurisdictional question, I'm not sure how much, Your Honor, wants to -- wants to hear on that. I -- I agree and it was -- this was in my notes that what the Court said that a lower court may not expand or alter its prior judgement that's on appeal, and I think quite clearly, that's what Transform seeks here. They're asking the Court, putting aside this -- the question of did they satisfy the -- the two year provision?

All the other relief that they're asking for,

they're asking the Court to give an opinion on all these other conditions that -- that Transform says it has satisfied. We quite -- quite clearly say they haven't. That -- I'm happy to get into the substance of that, but that is very obviously expanding on the -- on the assignment order. The assignment order --

THE COURT: Yes, but --

MR. OTSUKA: -- authorized --

THE COURT: -- but it doesn't seem to be interfering with it. I mean, if -- if -- if -- see, I actually think that is the type of thing that I could -- that aspect, I think I probably could rule on. I'm not sure it's really T'd up for me to rule on today because I think I need to hear some evidence on compliance with the right of first offer and the, you know, and the lease in terms of an acceptable subtenant. But that's -- that's a question that is really, to me, very far removed from whether Section 363M isolates consideration of my order on appeal. I think that's a very different issue. I mean, for example, if -- if I had authorized the assumption and assignment of the lease or -- or the -- yeah, the assumption and assignment of the lease and it required ongoing adequate assurance payments, right? Which it did in fact, I mean, it's only $10.00 a year, plus taxes, but if in year two, Transform didn't pay the taxes and you wanted to enforce that cure

payment here as opposed to in Minnesota in state court, that wouldn't interfere with the appeal. I mean, it's separate issue. Say -- similarly with the ability to sublease. I don't see how that interferes with the appeal. It's a -- it's a separate issue.

MR. OTSUKA: Your Honor, a few things. So first of all, Transform is asking the Court to issue and order that says Transform has prevailed in the litigation regarding assignment of the Master Lease, therefore the Master Lease assignment is fully valid and enforceable.

THE COURT: That's -- I -- that's the -- I understand. That point, I understand and that's why I was focusing on the two different issues. I think that --

MR. OTSUKA: So may --

THE COURT: And the reason they want that decided is they're concerned about the two years. And but --

MR. OTSUKA: But Your Honor --

THE COURT: -- but they're also asking for a determination that the right of first offer was complied with and -- and -- that -- that and that the lease -- the prospective subtenant is an acceptable tenant under the lease, and to me, that -- that's different than saying all of the litigation is done. Clearly, all of the litigation is done, that's something before the Circuit, whether it's done or not. That's up before the Circuit. That's the

process of getting a stay or not of the -- of the -- the -- the mandate and -- but that's all occasioned by what I think is a misplaced concern by Transform, that they're up against a deadline that's about to expire and may well expire before Cirt is dealt with, and -- and I think that's a separate issue. But as far as the other --

MR. OTSUKA: If you --

THE COURT: -- relief they're seeking, while I'm not prepared to do it today, because this is not an evidentiary hearing, I don't see how that interferes with the appellate process.

MR. OTSUKA: I -- I'm sorry, Your Honor, just to clarify, when you say the other relief they're seeking, which -- which part of that were you referring?

THE COURT: Well, they -- they -- they attach to their motion MOAC's letter which says we don't accept the subtenant, and they want a determination that you've done that improperly, because this is an acceptable subtenant, and that the lease has been complied with. To me that's -- that -- that has very little, if anything to do with the appeal. Whereas, if they ask for the determination they're all -- that the litigation contingency is -- is over, well, I think that -- that does have something with the appeal.

MR. OTSUKA: I understand.]

THE COURT: I mean, how could I tell the Second

Circuit that the litigation's over when they have a motion pending before them for a stay of the mandate?

MR. OTSUKA: I -- I understand the distinction you're just -- Your Honor's making, and I -- and I certainly agree that there's a difference -- I'm not conceded the same conclusion that, Your Honor, just said, but I do agree that -- that is -- it's not proper for this Court to make the determination that the litigation contingency, as a whole, has been satisfied.

THE COURT: Right. Okay.

MR. OTSUKA: So -- I -- I don't know where that leaves us right now.

THE COURT: Well, I think -- again, where I think it leaves us is I could schedule an evidentiary hearing on the lease compliance issues, if you will. You know, has the right of first offer been complied with and is the proposed subtenant a tenant that could be rejected by the landlord. I don't want to have -- I mean, we're not having that hearing today, it wasn't scheduled as an evidentiary hearing. I don't know when I would have time to do it. I don't know if anyone wants to take discovery on it. But I don't -- I don't think anything more needs to be said on that point today. What I don't believe requires an evidentiary hearing, but which I also believe I should defer on under Rule 8008, is a ruling on the other portion of the

motion which, as you said, seeks a determination that the -- the contingency has occurred. Which really means the litigation is done. But I think I should state and authorize and direct the movant, Transform, to so inform the Circuit that I believe the two year limitation under my order doesn't apply in these circumstances where the S&E tenant, Transform, has obtained, under what apparently is a -- a fully documented sublease, a tenant, and the only thing impeding that tenant from taking, under the sublease, within the two years is the fact of the pending appeal and -- and litigation occasioned by the landlord's denial of acceptability of the tenant and the right of first offer being complied with. And I think, frankly, because you have a pending motion for a stay of the mandate, if the Circuit wants to grant that stay, it could put conditions on it like extending the two year period, posting a bond, whatever. If it doesn't extend -- if it doesn't stay the mandate, I believe that at that point, I should determine, and I'm telling you know how I will determine it, the two year issue, and -- and determine that that two years doesn't run until the appellate process is finished, with suitable time to close the deal. And we'll leave it at that.

I mean, that's the really pressing dispute. That really is a case for controversy. It's very live, I mean, they lose this tenant if -- if that two years runs under the

interpretation that I'm not accepting, but I think there should be an order that reflects that. I'm not accepting it. And similarly, the issue of an acceptable tenant is -- is live too, and I think I have jurisdiction over it, because it's part of the adequate assurance, you know, I basically said, this has to get done. This part of the assignment of the lease.

So I don't want to interfere with what you've T'd up in the Circuit court, but I think they should know how I would rule if they denied the stay and leave it at that.

So I would -- I would not dismiss the motion, I would defer consideration of it. I think the parties should discuss whether they need discovery, agree on a discovery schedule, and get a hearing date for an evidentiary hearing, which I think would be no more than half a day, and they can get that from Ms. Lee in the clerks' office. And again, I -- I'm telling you both now that I would make it clear that the two year limitation doesn't apply in this situation where those two issues, namely the acceptable tenant and then right of first offer, have been raised by the landlord, basically right at the end of the two year period, and the appeals process has prevented the closing of what would otherwise be a, you know, a real tenant, sublease. Because, again, that wasn't -- that wasn't what I was addressing in that condition of adequate assurance of future performance.

What I was addressing was a situation where Transform literally didn't come up with someone, who was real, within two years and just kept the landlord hanging out there, potentially for up to 70 years, because that was the remainder of the lease, which wasn't -- which I didn't believe fair.

MR. OTSUKA: Thank you, Your Honor, if I --

THE COURT: So I don't think you needed an order on this at this point. I think obviously you should get the transcript, promptly, and let the Circuit know the result and then you may want to give me a scheduling order or if you're comfortable that you can take whatever discovery you need before the hearing, just schedule the hearing and we'll go ahead with the evidentiary hearing. If it's at any time in the next couple of months, it will probably held remotely. I have a well developed form of remote hearing order and procedure that you can get from Mr. Andino in the Clerks' office that, you know, just help you plan for that.

MR. MARTIN: Your Honor, this is Craig Martin. Thank you for that. I think what I've heard you say is on the 8008 indication to the Second Circuit, that we are authorized and directed to do so, and that we can provide the transcript. You won't be doing any type of writing on that --

THE COURT: Right.

MR. MARTIN: -- so what we'll -- we'll figure out how to do that, and then we will be happy to confer with Mr. Otsuka so that our clients can decide how much discovery they want and then work together to come up with an appropriate hearing date on these other issues that you've identified today.

THE COURT: And as -- and as you know from the last evidentiary hearing before me, my practice is to take direct testimony by declaration or affidavit with the witness to be life for cross and redirect. And for the parties to meet and confer and agree on the admissibility of as many exhibits as they, in good faith, can agree on being admissible, and submit a joint exhibit book, along with the witness declarations of direct testimony to chambers a few days before the evidentiary hearing, and a separate binder of any exhibits whose admissibility they want to fight over.

MR. OTSUKA: Your Honor, Greg Otsuka, one more time, or at least one more time for now. I heard you say earlier, and I just want to make sure that the -- the transcript is reasonably clear, since there won't be a written order, that -- I heard you say that the two year -- in the Court's opinion, the two year deadline shouldn't expire by virtue of the issues that you identified, but that it also is not true that the two years should -- should start over --

THE COURT: Yeah --

MR. OTSUKA: -- that there should be some reasonable time --

THE COURT: There should be a reasonable time to enable the identified transaction to close.

MR. OTSUKA: Understood.

THE COURT: Okay. I think you're on mute, Mr. Martin, although I don't see the symbol of that, but you're on mute. Maybe it's because you took off your headset? I don't know.

MR. MARTIN: A can you -- are you able to hear me?

THE COURT: Yeah, now I -- now I can hear you. Yeah.

MR. MARTIN: Just to be -- just to be clear on that point, the -- the sublease has a provision that, obviously, we have had a hard time getting a tenant, because of the litigation, and there is a timeline on the litigation resolution of 270 days. It -- so however long this takes, it is foreseeable that our subtenant, if we exceed that time period, would have the ability to exit, and we would effectively be starting over on a subtenant, so -- I understand if you don't want to make a ruling today, two years may be appropriate, depending on what happens. It may not --

THE COURT: If you --

MR. MARTIN: I don't want to impose that today --

THE COURT: I think all I can say at this point is it should be a reasonable time and -- look the Circuit may do all sort -- it may -- it may grant the stay, but it -- but impose a bond requirement. You know, there are lots of things that could be done. So I don't want to take that away from them. But I do want to let the know how I viewed this order because it think that's important for them to know. This condition in the order.

MR. MARTIN: And I appreciate that. I just wanted it to be clear that we do -- even though the clock that Your Honor -- we thought, Your Honor, set, may not be running, we do have a clock running in our -- in our sublease.

THE COURT: A separate deal clock. That -- that's fair and that's something you could raise with the Circuit. I'm just focusing on a reasonable time at this point.

MR. MARTIN: Understood and thank you, Your Honor. Unless you have any other question for me, I think we understand where you're coming from and --

THE COURT: Okay.

MR. MARTIN: -- what steps you would like us to take.

THE COURT: All right. Very well. Thank you.

MR. OTSUKA: Thank you.

MAN 1: Thank you, Your Honor.

WOMAN 1: Thank you, Your Honor.

THE COURT: Okay. I think that concludes the mattes in the Sears case for today, so I'll be signing off at this point. Thanks everyone.

MAN 1: Thank you, Your Honor.

WOMAN 1: Thank you.

(Whereupon these proceedings were concluded at 4:00 PM)

C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing transcript is a true and accurate record of the proceedings.

Sonya Ledanski Hyde

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Date: January 24, 2022

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No. 20-1846(L); 20-1953(XAP)

IN THE

United States Court of Appeals for the Second Circuit

IN RE: SEARS HOLDINGS CORPORATION, *Debtor*

MOAC MALL HOLDINGS LLC,
Appellant-Cross-Appellee,

v.

TRANSFORM HOLDCO LLC,
Appellee-Cross-Appellant.

On Appeal from the United States District Court
for the Southern District of New York

DECLARATION OF D. SCOTT CARR IN SUPPORT OF TRANSFORM'S EMERGENCY MOTION TO CLARIFY CERTAIN ISSUES PENDING MOAC'S PETITION FOR WRIT OF CERTIORARI

I, D. Scott Carr, declare under penalty of perjury:

1. I am currently employed by Appellee-Cross-Appellant Transform Holdco LLC ("Transform") as President – Real Estate. I have held this position since March 2020. Except where noted, I have personal knowledge of the matters set forth below. I respectfully submit this declaration (this "Declaration") in support of Transform's motion to clarify.

2. I have 32 years' experience in the commercial real estate markets, particularly relating to the leasing and marketing of retail spaces and spaces in shopping centers. I have prior experience including direct leasing and oversight of the entire leasing function for a portfolio of 165 retail shopping centers totaling more than 16,000,000 square feet.

3. Since the bankruptcy court entered its September 5, 2019 order authorizing the sale of Sears' lease at the Mall of America in Bloomington, Minnesota, Transform has engaged in substantial marketing efforts to locate a subtenant to occupy portions of the premises pursuant to the two-year deadline included within the bankruptcy court's order. I was personally involved in some of these efforts and supervised the efforts of others

working on Transform's behalf. Finding retailers willing to lease a large space in a shopping mall was already a challenging process in late 2019 due to market conditions affecting brick and mortar retailers. Those challenges were exacerbated by the COVID-19 pandemic and its implications for indoor in-person shopping.

4. Early in 2021, after approximately 18 months of searching, Transform made significant progress in locating a major retailer seriously interested in subleasing one of three floors in the space and later entered into a sublease with the subtenant.

5. Given MOAC's ongoing litigation with Transform, the subtenant required comfort that it would be able to remain in the space. Thus, the sublease includes a litigation contingency clause to this effect.

6. The litigation contingency clause delays the effectiveness of the sublease until a "Critical Determination" has been made that: "(i) the Master Lease Assignment is fully valid and enforceable," (ii) the Sublease "is a valid and enforceable sublease under [the] Master Lease," (iii) the Sublease "constitutes a sublet as contemplated under" the Second Circuit stay order,

and "(iv) the ROFR Resolution Date . . . has occurred in connection with this Lease." The Sublease also has a provision that if the Litigation Resolution or the ROFR Resolution have not occurred within 270 days after the day the Sublease was executed on November 2, 2021, then either Transform or the Subtenant can terminate the Sublease, unless they agree otherwise.

7. On November 4, 2021, Transform sent notice to MOAC of the right of first refusal as required by the bankruptcy court 's order and the master lease. In the notice, Transform provided the executed sublease and offered MOAC the right to sublease the space from Transform at the same price, terms, and conditions.

8. On December 17, 2021, MOAC responded to the notice, rejecting the right of first refusal and stating that they objected and did not consent to the sublease.

Pursuant to 28 U.S.C. § 1746, to the best of my knowledge, information and belief, and after reasonable inquiry, I declare under penalty of perjury that the foregoing is true and correct.

Dated: February 4, 2022
Hoffman Estates, IL

D. Scott Carr